No. 89-1150

In The

Supreme Court of the United States

October Term, 1989

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER,
MARK WEINER, and ROBERT WEINER, SR.,
as Personal Representative of the Estate of Steven Weiner,

Respondents.

**On Petition For A Writ Of Certiorari
To The District Court Of Appeal Of Florida,
Fourth District**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the District Court of Appeal of Florida, Fourth District, erred in holding that no employee benefit plan exists where no plan was established or maintained by an employer or employee organization for the purpose of providing benefits to employees.

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STATEMENT OF THE CASE

Petitioner, Blue Cross and Blue Shield of Maryland, Inc. ("BCBSM"), introduces the decision below as one in which the District Court of Appeal of Florida, Fourth District ("Florida appellate court"), sanctions state tort claims involving employee benefit plans, thereby threatening the very existence of thousands of plans by stripping them of the protection afforded by the Employee

Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.* The issue below, however, was not whether state tort claims involving employee benefit plans should be sanctioned, but whether an employee benefit plan existed at all. The reality of the Florida appellate court's decision is that it simply applies an established federal principle – that an employee benefit plan exists only if it is established or maintained by an employer or employee organization to provide benefits to employees – to the unique facts of this case. As those facts demonstrate, the decision below does not speak to thousands of employee benefit plans, but only to the question of whether one existed in connection with the purchase of health insurance by Respondent Robert Weiner, Sr.

In 1982, Mr. Weiner purchased health insurance for his family from BCBSM. That summer, one of his sons, Respondent Mark Weiner, became a quadriplegic in a fall. At about the same time another son, Steve, became ill and was diagnosed as having AIDS. Steve would also become paralyzed before he died.

The boys' health care needs were staggering, but for almost a year they were met with BCBSM's coverage. Then in 1983 BCBSM terminated both boys' insurance. The termination was predicated upon fabricated coverage defenses, and upon terms contained in the master policies which were intentionally more restrictive than the coverage representations BCBSM made in the benefits book it provided the Weiner family (collectively "Weiners") when the policy was sold. Without insurance coverage,

the family subsisted in a trailer with Mr. and Mrs. Weiner trying to give round-the-clock care to their two paralyzed sons, one dying. The ordeal they went through cannot, and fortunately need not, be described in the limited space available here.

In 1984, the Weiners filed suit against BCBSM and its servicing agent, Blue Cross and Blue Shield of Florida, Inc. ("BCBSF"), in Florida state court. After more than two years of discovery the case went to trial on the Weiners' claims of fraud, intentional infliction of emotional distress and negligence. The jury returned separate verdicts against both BCBSM and BCBSF, finding against BCBSM on all counts. Final judgments were entered by the Florida trial court in the fall of 1986. The issue of ERISA preemption was never raised.

BCBSM appealed the state trial court judgment to the Florida appellate court in 1987. For the first time, BCBSM contended that the Florida courts lacked subject matter jurisdiction because the Weiners' tort claims were based upon the improper processing of claims for benefits under an employee benefit plan, and thus were preempted by ERISA. BCBSM specifically asked the Florida appellate court to decide the issue on the record before it.

In April of 1988, some 18 days before oral argument was to take place in the Florida appellate court, BCBSM filed an action for declaratory and injunctive relief and a motion for preliminary injunction in the United States District Court for the Southern District of Florida. BCBSM asked the district court to declare the Florida state court

judgment void and unenforceable, and to temporarily and permanently enjoin the Weiners from taking any further action in the Florida appellate court – all on the basis of the same ERISA preemption arguments it makes before this Court.

The district court afforded BCBSM an emergency hearing, received extensive memoranda, and denied the motion for preliminary injunction. In addition, the district court abstained. Abstention is inappropriate in the face of a claim of federal preemption that is plain, obvious or readily apparent, *see, e.g., Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353 (9th Cir. 1986); *Baggett v. Department of Professional Regulation Bd. of Pilot Comm'rs*, 717 F.2d 521 (11th Cir. 1983); *Aluminum Co. of America v. Utilities Comm'n of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), but the district court found on the evidence before it that ERISA preemption was "a far cry from being 'readily apparent' ".

BCBSM appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit affirmed the district court's decision to abstain, and ordered the case dismissed for lack of subject matter jurisdiction based in part upon a finding that the "Florida appellate court is an appropriate forum for determining whether the state trial court had jurisdiction. . . ." *Blue Cross and Blue Shield of Maryland, Inc. v. Weiner*, 868 F.2d 1550, 1555-1556 (11th Cir.), *cert. denied*,

___ U.S. ___ (October 10, 1989).[1] The Florida appellate court decision was before the Eleventh Circuit when it denied BCBSM's suggestion for rehearing in banc.

BCBSM petitioned this Court for a writ of certiorari to the Eleventh Circuit in August of 1989. In addition to the procedural questions involved, BCBSM and the Weiners joined issue on the same question BCBSM now presents – whether there was an ERISA plan. This Court denied the petition for writ of certiorari on October 10, 1989.

The Florida appellate court, which was never informed of the attempt to halt its deliberations in federal court, rendered its decision on April 26, 1989. BCBSM's position with regard to the existence of an employee benefit plan was different before the Florida appellate court. While it contended then as now that Mr. Weiner or the Weiner service station created an employee benefit plan, at the association of employers level BCBSM contended that the Service Station Dealers of America ("SSDA"), as opposed to the Allied Gasoline Retailers' Association of Florida ("AGRA"), created the plan.

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[1] This decision is in keeping with a wealth of federal decisions holding that state courts are competent and appropriate forums to decide whether ERISA plans and ERISA preemption exist. *See, e.g., Transamerica Occidental Life Ins. Co. v. Digregorio*, 811 F.2d 1249, 1255 n.5 (9th Cir. 1987); *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 822 n.10 (9th Cir. 1985); *Johansen v. Employee Benefit Claims, Inc.*, 668 F.Supp. 1294, 1297 (D. Minn. 1987); *Browning Corp. Int'l v. Lee*, 624 F.Supp. 555, 557 (N.D. Tex. 1986).

On the ERISA issues joined in the Florida appellate court, the evidence showed that no employee benefit plans existed in connection with Mr. Weiner's purchase of health insurance. Rather, it showed that BCBSM and Associated Financial Services, Inc. ("AFSI"), an insurance broker, simply created a group insurance policy to sell to a perceived market niche – service station dealers. To this end, three insurance policies, which BCBSM relies upon as setting forth the terms of the plan, were prepared and purportedly entered into between BCBSM and SSDA. (PX. 29, 30, 31).[2] The catch, however, was that SSDA, which arguably would qualify as an association of employers and thus as an employer under ERISA, had nothing to do with the matter. SSDA was never consulted by BCBSM or AFSI about a plan, it never gave them permission to use its name, and its signature was forged on the group policies by the President of AFSI. (R. 2004-2007, 2020-2021, 2038-2039). SSDA's name was simply used as a ruse to make the group policy more marketable. (R. 2042).

Twelve days after the insurance contracts or "plan documents" were forged, an endorsement was issued by BCBSM eliminating SSDA as both the contracting party and the insured group. AFSI, the insurance broker, was substituted in SSDA's place. (PX. 24; R. 1977-78, 2021). Thereafter, the policies or "plan" at issue provided that BCBSM would provide insurance benefits to the

[2] Evidentiary citations are to the record below. "PX" designates the plaintiffs' exhibits introduced at trial, and "R" designates references to the trial transcript or depositions and pleadings which were made part of the record.

employees of AFSI, an insurance broker having nothing to do with service station dealers or their associations, under the stated terms.

As would be expected in this scenario, neither the group insurance policies nor the benefits booklet made any reference to an ERISA plan or to ERISA as the governing body of law. (PX. 1, 29, 30, 31). Further, none of these documents complied with the requirements for a plan description, 29 U.S.C. §1022, and no attempt was made to comply with ERISA's reporting requirements. 29 U.S.C. §§1023, 1024.

Based on these facts, at the association of employers level the Florida appellate court found that "there was no plan, or even an informal agreement, established or maintained by an employer or an employee organization." Rather, the Florida appellate court found just an "insurance marketing scheme". (Appendix A to Petition, p. 8.).

To avoid the effect of the evidence of its own fraud, BCBSM now contends that AGRA, not SSDA, established or maintained the employee benefit plan. But his new position fails to put a better face on it. As with SSDA, AGRA established nothing. There was no agreement between BCBSM and AGRA for the provision of benefits to AGRA members. BCBSM admitted in response to a request for admissions that it never had any insurance contracts with AGRA (PX. 27), and confirmed through trial testimony that its insuring agreements never went beyond those it had with AFSI. (R. 2039-2040). The "plan" thus provided benefits for AFSI's employees, not AGRA members, and neither the insuring agreements nor the

benefits booklet even mentioned AGRA. (PX. 1, 29, 30, 31).

All BCBSM and AFSI were doing was selling insurance directly to service station dealers, with AFSI handling the marketing and administration of the policies. (R. 3036, 7952). AFSI's President confirmed in trial testimony that AFSI was not in any way acting on behalf of AGRA:

> Q. . . . [Y]ou were not, as far as this business was concerned, acting in any capacity as the agent for this state organization, the Florida state organization; were you?
>
> A. No.

(R. 1986).

As for BCBSM's alternate position that Mr. Weiner himself created an employee benefit plan when he purchased health insurance, the evidence showed that Mr. Weiner ran a service station in Dania, Florida as a sole proprietor. (R. 5442, 5503). He and his son Robert Weiner, Jr. worked there along with others. (R. 5445, 5504, 5648-5649). He had never provided any health insurance benefits for his employees, but he religiously provided it for his family. (R. 1504-05). Four separate times at trial and in depositions, when ERISA preemption was not an issue, Mr. Weiner was asked about his purpose in purchasing insurance from BCBSM. Each time he responded that it was to provide insurance for his family. (R. 1509, 1525-26, 1627, 5451). No one was covered by the insurance Mr. Weiner purchased from BCBSM other than family members. One of these family members was a son who worked for him, but the son's testimony also makes

it clear that the motivating relationship was familial rather than employer-employee:

> Q. Did there come a time when you purchased a policy of insurance from [BCBSM] through [SSDA]?
>
> A. Not personally.
>
> Q. You did not?
>
> A. No. My father took care of all the insurances.

(R. 6429).

> Q. Do you know who you were insured with prior to your having become insured under the [BCBSM] plan through [SSDA]?
>
> A. No, I don't.
>
> Q. Did your father take care of those things at that time?
>
> A. He took care of the personal insurance, when it came to health insurance, yes.

(R. 6437).

On these facts, the Florida appellate court again found that "there was no plan . . . established or maintained by an employer or an employee organization", noting that Mr. Weiner was "a sole proprietor who simply purchased a group policy for his family". (Appendix A to Petition, p. 8).

Because the Florida appellate court found that no employee benefit plan existed, it rejected BCBSM's ERISA preemption defense. BCBSM sought discretionary review of the Florida appellate court's decision in the Supreme Court of Florida, contending, *inter alia*, that the appellate

court should not have decided the ERISA preemption question without remanding the matter for trial. Review was denied on October 24, 1989.

REASONS FOR DENYING THE WRIT

1. The Decision Below Raises Neither the Issues Nor the Specters Raised in the Petition

In an attempt to enlarge the importance and effect of the Florida appellate court's decision, BCBSM raises issues and specters which are not raised by the decision below.

First, in delineating the Questions Presented for Review, and in introducing both its Statement of the Case and Reasons for Granting the Writ, BCBSM suggests that the decision below sanctions the bringing of common law tort claims based upon the processing of a claim for benefits under an employee benefit plan – claims which this Court held to be preempted by the public policy and Congressional mandates of ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). The decision below, however, issues no such challenge. The Florida appellate court acknowledged the controlling precedent of *Pilot Life*, declining to find ERISA preemption only because it found that no ERISA plan existed. Needless to say, there is no authority anywhere suggesting a contrary rule.

Second, BCBSM suggests that the Florida appellate court ignored established federal precedent. To the contrary, established federal law was the cornerstone of its opinion. The operative principle of the decision below is that an employee benefit plan exists only if the plan was

established or maintained by an employer for the purpose of providing benefits to employees. This principle comes from both ERISA and the federal decisions. In relevant part Congress defined an employee welfare benefit plan as one "established or maintained by an employer . . . for the purpose of providing [benefits] for its participants or their beneficiaries. . . ." 29 U.S.C. §1002(1). A participant was defined as "any employee . . . of an employer." 29 U.S.C. §1002(7). Congress repeated the first part of this fundamental premise in delineating the scope of ERISA's coverage, providing again that ERISA would apply to "any employee benefit plan if it is established or maintained . . . by an employer." 29 U.S.C. §1003(a)(1).

The message has not been lost on the courts, as evidenced by the Eleventh Circuit's holding that:

> A plan . . . falls within the ambit of ERISA *only* if the plan . . . covers ERISA participants *because of their employee status in an employment relationship, and an employer . . . is the person that establishes or maintains the plan. . . .*

Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982) (emphasis added).

Congress has even re-emphasized the point in response to the phenomenon, present here, of entrepreneurs attempting to characterize their insurance products as ERISA plans:

> [T]hese plans are established and maintained by entrepreneurs for the purpose of marketing insurance products or services to others. They are not established or maintained by the appropriate parties to confer ERISA jurisdiction, nor

- is the purpose for their establishment or maintenance appropriate to meet the jurisdictional prerequisite of the act.

H.R. Rep. No. 1785, 94th Cong., 2nd Sess. 48 (1977), *cited in Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd. of Public Instruction*, 804 F.2d 1059, 1063 (8th Cir. 1986).

The cardinal principle that a plan must be established or maintained by appropriate parties for the appropriate purpose was the Florida appellate court's guide.

Next, BCBSM suggests that the decision below will have far reaching impact because it holds that a small business owned by a sole proprietor cannot establish an ERISA plan – thus "eliminating an entire class of businesses from coverage by ERISA." (Petition p. 20). The Florida appellate court, however, made no such pronouncement. It held that the sole proprietor *in this case* did not establish an employee benefit plan because he "simply purchased a group policy for his family". (Appendix A to Petition, p. 8). For a purchase of insurance to constitute an ERISA plan it must be made for the purpose of providing benefits to employees, 29 U.S.C. §1002(1), (7), or as the Eleventh Circuit put it, to cover participants "because of their employee status in an employment relationship." *Donovan v. Dillingham*, 688 F.2d at 1371; *accord, Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd. of Public Instruction*, 804 F.2d 1059 (no ERISA plan where benefits not provided for statutory purpose). That the purpose necessary to create an employee benefit plan may be lacking when a small businessman purchases insurance for his family has been recognized by the federal courts. *See Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 741 (7th Cir. 1986); *Donovan v. Dillingham*, 688 F.2d at 1375; *Davis v.*

Time Ins. Co., 698 F.Supp. 1317, 1321 (S.D. Miss. 1988); *Taggert* [sic] *Corp. v. Efros*, 475 F.Supp. 124, 127 (S.D. Tex. 1979), *aff'd sub nom., Taggart Corp. v. Life & Health Benefits Administration*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).[3]

Finally, BCBSM asserts that the decision below will have far reaching impact because it eliminates employee benefit plans established by associations of employers from the coverage of ERISA. Again, the Florida appellate court made no such ruling. To the contrary, it correctly held that a plan which was not established or maintained by an association of employers was beyond ERISA's coverage. ERISA's requirement that a plan be established or maintained by an employer or employee organization to provide benefits to employees applies to all plans – including those involving an association of employers. BCBSM seems to criticize the Florida appellate court's reliance upon *Donovan* and *Taggart* because those cases involved multiple employer trusts as opposed to associations of employers, but the "established or maintained"

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[3] BCBSM correctly points out that the Fifth Circuit's holding in *Taggart* that an employer who subscribes to a multiple employer trust cannot thereby create an employee benefit plan has not been followed. This aspect of *Taggart*, however, had nothing to do with the Florida appellate court's decision. The two *Taggart* holdings which are pertinent to the decision below – that a plan established and maintained by entrepreneurial interests rather than ERISA employers is not an ERISA plan, and that the bare purchase of insurance by a businessman for his family does not create an employee benefit plan – have been approved and followed. *See Donovan v. Dillingham*, 688 F.2d at 1375.

principle those cases stand for applies equally to associations of employers.[4] Not only does ERISA make this clear, but the federal courts have done so by declining to find employee benefit plans when the association of employers or the employee organization involved did not establish or maintain the plan. *See Plotkin v. Association of Eye Care Centers, Inc.*, 710 F.Supp. 156 (E.D.N.C. 1989) (no plan established or maintained by group claiming, *inter alia*, to be an association of employers); *Baucom v. Pilot Life Ins. Co.*, 674 F.Supp. 1175 (M.D.N.C. 1987) (employee organization, if it existed, did not establish or maintain the plan); *Insurance & Prepaid Benefits Trusts v. Marshall*, 90 F.R.D. 703 (C.D. Cal. 1981) (association of employers did not establish or maintain the plan).

In sum, rather than making important new pronouncements of federal law with far reaching impact, the decision below simply applied settled principles of federal law in a recognized fashion.

2. The Florida Appellate Court Correctly Determined That No Employee Benefit Plan Exists Without Creating Conflict Among Decisions

Apart from the prolific use of hyperbole, BCBSM's claim that review is appropriate because the Florida appellate court's decision is "inexplicable" is based upon three major premises: (1) that the decision below conflicts

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[4] *Xaros v. U.S. Fidelity and Guar. Co.*, 820 F.2d 1176 (11th Cir. 1987), also cited by the Florida appellate court, confirmed in another context that only employers who establish or maintain a plan are ERISA employers.

with the decisions of the Ninth Circuit in *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3216 (1989), and of a California appellate court in *Lambert v. Pacific Mutual Life Ins. Co.*, 211 Cal. App. 3d 456, 259 Cal. Rptr. 398 (Cal. App. 1 Dist. 1989), on "virtually identical" facts; (2) that both AGRA and Mr. Weiner's service station established employee benefit plans which meet the five-part test for a plan suggested by ERISA and the federal decisions; and (3) that the Department of Labor Regulation set forth in 29 C.F.R. §2510.3-1(j) (1989) requires a finding that both AGRA and Mr. Weiner's service station established ERISA plans.

As will be demonstrated below, each premise is flawed. The five-part test for establishing an employee benefit plan provides that one exists if:

> (1) a 'plan, fund, or program' (2) [is] established or maintained (3) *by an* employer or an employee organization or both, (4) *for the purpose of* providing [benefits] (5) to participants or their beneficiaries.

Donovan v. Dillingham, 688 F.2d at 1371 (emphasis added). BCBSM's analysis fails, however, on the critical connecting phases which are emphasized above. BCBSM asserts that a plan was established or maintained based upon the terms of the insurance contracts entered into between BCBSM and AFSI, and that AGRA is an association of employers which qualifies as an employer under ERISA. (Petition, pp. 12-13). Ignored, however, is the fact that the plan it perceives was not established or maintained *by*

either SSDA or AGRA. The insurance contracts BCBSM relies upon as setting forth the terms of the plan provide benefits to AFSI's employees, not SSDA or AGRA members and their employees. (PX. 29, 30, 31). SSDA never knew anything about these agreements, and was not a party to them. (R. 2004-2007, 2020-2021, 2038-2039). Likewise, AGRA never had any agreements with BCBSM (PX. 27; R. 2039-2040), and the group policies were administered by AFSI, not AGRA. (R. 3036, 7952). Further, AFSI admitted that it was not acting as AGRA's agent. (R. 1986).

On the association of employers level then, the plan was established and maintained by BCBSM and AFSI, not SSDA or AGRA. The fact that BCBSM fraudulently used SSDA's name changes nothing. When entrepreneurial businesses establish a plan to provide what otherwise would be ERISA benefits, no employee benefit plan is created. *Donovan v. Dillingham*, 688 F.2d at 1373; *Taggart Corp. v. Life & Health Benefits Administration*, 617 F.2d at 1210; *Hamberlin v. VIP Ins. Trust*, 434 F.Supp. 1196 (D. Ariz. 1977).

On Mr. Weiner's or the Weiner service station level, the insurance simply was not purchased for the purpose of providing benefits to his employees. The undisputed testimony at trial was that Mr. Weiner was purchasing insurance for his family, and only members of his family were insured. While one son worked for him, none of the other people working at the service station were

provided any benefits.[5] ERISA does not regulate the purchase of health insurance when there is no plan. *Donovan v. Dillingham*, 688 F.2d at 1375.

Ironically, the two cases BCBSM finds to be in conflict with the decision below actually underscore the reasons why there is no employee benefit plan in this case, and why the Florida appellate court ruled the way it did. In *Kanne*, an employee benefit plan was found to exist based on the fact that an association of employers purchased an insurance policy, that the employer group was designated as the plan administrator, and that the benefit booklet described the group insurance as an ERISA plan. This, of course, is what it looks like when an association of employers establishes or maintains a plan. In this case, however, the facts are just the opposite. Neither AGRA nor SSDA purchased an insurance policy or had any other agreement with BCBSM, neither of them was the plan administrator, and the benefit booklet never mentioned ERISA.

The same stark contract exists between the facts in *Lambert* and those here. In *Lambert* the employer entered into a subscription agreement for medical coverage for its employees; the agreement specifically provided that the

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[5] BCBSM's argument that the other people working for Mr. Weiner should not be considered employees for ERISA purposes because Mr. Weiner characterized them as "independent contractors" is wide of the mark. The employer's characterization is not the test. *See, e.g., Holt v. Winpisinger*, 811 F.2d 1532, 1538-39 (D.C. Cir. 1987); *Richardson v. Central States, Southeast and Southwest Areas Pension Fund*, 645 F.2d 660 (8th Cir. 1981).

plan was subject to ERISA; the benefit booklet contained information complying with ERISA's summary plan description requirements, including a statement of employees rights under ERISA; and the employer was designated as the plan administrator. Again, none of these critical facts are present in the instant case. No employer entered into a subscription agreement, much less one mentioning ERISA. The benefit booklet does not mention ERISA or otherwise comply with its summary plan description requirements.[6] And no employer was designated or acted as the plan administrator.

Finally, BCBSM's argument that the Department of Labor Regulation found at 29 C.F.R. §2510.3-1(j) compels a finding that an ERISA plan exists is legally incorrect. Relying on *Kanne*, BCBSM maintains that if all of the four criteria set forth in the regulation for excluding certain types of group insurance programs from ERISA's coverage are not met, the purchase of insurance in question automatically constitutes an ERISA plan. Both *Kanne* and BCBSM, however, overlook the Department of Labor's caution to the contrary:

> Some of the practices listed in this section as excluded from the definition of a 'welfare plan' or mentioned as examples of general categories of excluded practices are inserted in response to

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[6] BCBSM correctly notes that the failure to comply with ERISA's administrative and reporting requirements does not prevent ERISA coverage if an employee benefit plan has been established. Such failures are facts, however, which can be considered in determining whether a plan was established. *See, e.g., Jordan v. Reliable Life Ins. Co.*, 694 F.Supp. 822 (N.D. Ala. 1988).

> questions received by the Department of Labor and, in the Department's judgment, do not represent borderline cases under the definition in section 3(1) of the Act. *Therefore, this section should not be read as implicitly indicating the Department's views on the possible scope of section 3(1).*

29 C.F.R. §2510.3-1(a)(4) (1989) (emphasis added).

The court in the other case BCBSM relies upon did not miss this important preamble, and correctly noted that:

> it does not follow that an ERISA plan automatically exists when one or more of the four criteria are absent.

Lambert v. Pacific Mutual Life Ins., Co., 259 Cal. Rptr. at 403. Otherwise stated, 29 C.F.R. §2510.3-1(j) does not do away with the fundamental statutory requirements for an employee benefit plan – requirements not met here because there was no plan established or maintained by an employer for the purpose of providing benefits to employees.[7]

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[7] It must also be noted that, in making its argument under 29 C.F.R. §2510.3-1(j), BCBSM takes many liberties with facts. For example, BCBSM asserts that "AGRA received a per capita administrative fee to compensate it for endorsing and marketing the plan". (Petition, p. 15). This does not appear in the record. BCBSM also asserts that the Weiner service station paid the insurance premiums. While it is true that the check Mr. Weiner wrote said "Weiner Service Station" at the top (PX. 4), the account was also for personal use as demonstrated by the fact that Mr. Weiner paid for his non-employee son's insurance policy with a "Weiner Service Station" check as well. (PX. 11).

(Continued on following page)

The decision below, far from being inexplicable, correctly held that no employee benefit plan exists under the facts of this case.

3. It Was Proper for the Florida Appellate Court to Decide the Question of ERISA Preemption

BCBSM's repeated suggestion that review and reversal are warranted because the Florida appellate court decided the question of ERISA preemption for the first time on appeal is wide of the mark for several reasons.

First, the situation BCBSM complains of was entirely of its own making. While this Court did not address the question of whether ERISA preempts common law claims based upon the processing of a claim for benefits under an employee benefit plan until its 1987 decision in *Pilot Life*, the defense of ERISA preemption was not created by the *Pilot Life* decision, but by the 1974 Act. 29 U.S.C. §§1132(e)(1), 1144(a).

Where applicable, ERISA preemption was thus being raised as a defense to claims such as the Weiners' long before this case went to trial. *See, e.g., Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1469-70 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987) (state fraud claim seeking damages

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(Continued from previous page)

Similarly, BCBSM quotes the insurance contracts as providing "that the '*Company* shall pay' the premiums". (Petition, p. 15). The contracts actually provide that the "Company shall pay *or cause to be paid. . . .*" (PX. 29, 30, 31). In addition, the "company" being referred to is AFSI, not AGRA or the Weiner service station.

for lost benefits preempted); *Powell v. Chesapeake and Potomac Telephone Co.*, 780 F.2d 419, 421-22 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) (state law claims for intentional infliction of emotional distress, bad faith and breach of contract arising out of denial of disability benefits preempted); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1095 (9th Cir. 1985) (state law claims to recover wrongfully withheld retirement benefits preempted); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1214-16 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981) (claims for tortious interferences and fraud arising out of denial of benefits preempted); *Drummond v. McDonald Corp.*, 167 Cal. App. 3d 428, 213 Cal. Rptr. 164 (Cal. App. 4 Dist. 1985) (state law claims for fraud and intentional infliction of emotional distress arising out of processing of claims for medical and disability benefits preempted). In short, if BCBSM had believed that the Weiners' claims related to an employee benefit plan, there was nothing to prevent it from raising the defense of ERISA preemption in the state trial court.

Second, in deciding whether an ERISA plan, and thus ERISA preemption existed, the Florida appellate court was doing exactly what BCBSM requested. Does BCBSM expect anyone to believe that it would be complaining about an incomplete record if it had prevailed on the issue.

Third, the Florida appellate court was also doing what this Court commanded that it do in *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986). In the context of preemption under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.*, which the

Court equated in power to ERISA preemption in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), the *Davis* Court reviewed the Alabama Supreme Court's conclusion that a NLRA preemption defense was waived because, like here, it was not raised until after trial. Holding that the Alabama Supreme Court should have resolved the issue, the Court held:

> A claim of [NLRA] preemption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of [NLRA] preemption is raised, it must be considered and resolved by the state court.
>
> * * *
>
> [The Alabama Supreme Court] erred in declining to address the claim on the merits.

International Longshoremen's Ass'n v. Davis, 476 U.S. at 393, 399. The Florida appellate court's action was thus in keeping with the mandate of this Court.

Finally, there is nothing untoward or unusual about an appellate court considering a preemption defense, based upon ERISA or otherwise, when the issue is raised for the first time on appeal. In this case, the Eleventh Circuit held that:

> [T]he Florida appellate court is an appropriate forum for determining whether the state trial court had jurisdiction. . . .

Blue Cross and Blue Shield of Maryland, Inc. v. Weiner, 868 F.2d at 1555. In *Kanne v. Connecticut General Life Ins. Co.*, the case most heavily relied upon by BCBSM, the Ninth Circuit did exactly the same thing. And this Court ultimately did it in *International Longshoremen's Ass'n v. Davis*. There is simply no rule of law precluding consideration

of an ERISA preemption defense for the first time on appeal.

CONCLUSION

For the above reasons, it is respectfully submitted that BCBSM's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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